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No. 77-112

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

REA EXPRESS, INC., *etc., Petitioner,*

v.

THE TRAVELERS INSURANCE COMPANY, *et al., Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for The District of Columbia Circuit

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BRIEF OF RESPONDENT THE TRAVELERS INSURANCE COMPANY IN OPPOSITION

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Respondent The Travelers Insurance Company ("Travelers") submits this brief in opposition to the petition by REA Express, Inc. ("REA") to review the decision of the Court of Appeals for the District of Columbia Circuit affirming the dismissal of this action by Chief Judge Jones in the District Court. The dismissal was based upon the decision of this Court in *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook Railroad Co.*, 417 U.S. 703 (1974). The complaint

in the District Court was predicated upon a claim of a conspiracy, in violation of federal antitrust laws, by the former owners of REA, Travelers and various unknown others to deprive REA of insurance benefits allegedly vested with employees of that company as the result of collective bargaining agreements. The alleged conspiracy resulted, according to the complaint, in forcing REA to pay higher premiums for insurance than it might otherwise have obtained and of forcing REA to accept an amendment to the life insurance policy covering retired employees to the detriment of REA. All of the alleged acts of conspiracy occurred during the time that the railroad defendants were the owners of REA and such acts were known to the new owners of REA at the time of their subsequent purchase of that corporation.

QUESTION PRESENTED

Does the applicability of the *Bangor Punta* decision to the particular and unique facts of this case, in a suit not brought on behalf of creditors or employees, deserve review by this Court under the standards set forth in Rule 19 of this Court.

STATEMENT OF THE CASE

Travelers, during 1954, successfully competed to become the primary underwriter of a group accident and health insurance policy, designated "GA 23000", for numerous railroads and railroad-related companies which had undertaken in accordance with a collective

bargaining agreement to provide prescribed uniform benefits, at uniform premium rates, for certain of their unionized employees. As a result of a subsequent collective bargaining agreement between the railroads and labor unions representing their employees, GA 23000 was amended in 1961 to provide term life insurance benefits for active employees of the railroads. In 1965 it was amended again to provide term life insurance benefits for retired employees. Because of the enormous number of employees being covered by the policy and the novel structure of the policy at its outset, a substantial portion of the total policy was reinsured by Travelers with other insurance companies on a participation basis.[1]

REA, then known as Railroad Express Agency, Inc., was not a party to GA 23000 at its inception but joined the existing policy in 1956 after REA became bound by a collective bargaining agreement to provide insurance benefits to those of its employees who were represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes. As a party to the contract REA was represented by a joint policy holder committee, consisting of representatives of employers and labor unions, with respect to all substantive questions concerning the administration of GA 23000.

In 1968 Travelers and the joint policyholder committee negotiated an amendment to GA 23000 which

[1] Travelers is the only insurance company which is a party to this litigation.

REA contends had the effect of depriving REA and some of its retired employees of benefits which had already vested under the policy. REA, however, does not contend that Travelers in any way deceived the joint policyholder committee with respect to the negotiation and adoption of the amendment. Rather, REA contends that its previous owners (*i.e.*, the railroads and their representatives) for some reason conspired with Travelers to adopt the amendment to the detriment of REA.[2] Later in 1968 the railroads which owned REA placed their shares in a voting trust and, a year later, REA's shares were purchased by new owners, who had been serving as interim management of REA under the voting trust.

Some three years later the new owners caused REA to initiate this action even though they did not own shares of REA at the time of the alleged wrongs and any recovery would have been a "windfall" to them. None of the acts complained of by REA were alleged to have been undertaken by Travelers alone, without the participation of, or agreement with, the railroads who were REA's prior owners and who were the persons from whom REA's new owners had purchased their shares.

[2] REA, despite its ostensible protestations about the amendment, accepted a credit of more than $2 million from the Special Account which Travelers maintained in connection with GA 23000 and remained a party to GA 23000 for four years beyond the adoption of the amendment and almost three years beyond REA's sale to its new owners who, during that period, brought this action.

Following the decision by this Court in *Bangor Punta Operatoins, Inc.* v. *Bangor & Aroostook Railroad Co.*, 417 U.S. 703 (1974), all of the defendants moved for summary judgment on the grounds that (1) recovery by REA's new owners for wrongs allegedly committed against REA prior to its sale, by its previous owners and Travelers, acting in concert with the previous owners, would constitute unjust enrichment to REA's new owners since they had purchased their shares with full knowledge of the matters complained of and at a price presumably reflecting those matters, (2) that any wrongs committed by, or with the participation or acquiescense of, REA's previous owners injured only the previous owners themselves, and (3) that REA's new owners had suffered no injury because they owned no stock in REA at the time of the alleged wrongs.

REASONS FOR DENYING THE PETITION

1. While REA argues at length the merits of its alleged causes of action, such argument is not responsive to the sole issue before this Court. REA's arguments on the merits were thoroughly refuted in the papers submitted by defendants to the District Court. The only issue which should appropriately be addressed to this Court is the applicability of *Bangor Punta* to the unique facts of this case, clearly not an issue of federal law which should be decided by this Court.

The essence of the *Bangor Punta* decision was this Court's recognition that, when the new owners of a

corporation purchase their shares for a price which presumably reflects whatever harm might previously have been done by the corporation's previous owners and those acting in concert with them, the new owners have not been injured by the past harm done to the corporation; any recovery, directly or indirectly, by the new owners would therefore constitute a "windfall" or unjust enrichment to them in violation of the "contemporaneous ownership" doctrine. 417 U.S. at 713, 716. *See* F.R. Civ. P. 23.1(1).

A striking example of the potential for unjust enrichment of a corporation's new owners is the prayer for damages in this very case, which consists of specified damages of close to $100 million (including trebling) as well as various unspecified amounts, as compared to the price of approximately $2 million which REA's new owners paid the railroads for ownership of the company. It is contrary to common sense to assume that a $100 million cause of action can be purchased for $2 million. *See In re REA Express, Inc.*, 412 F. Supp. 1239, at 1252 (E.D. Pa. 1976), where REA's new owners sought damages in excess of $345 million, including trebling, for harm done to REA prior to the new owners' $2 million purchase of the corporation's shares. Those claims in that case which were at all similar or analogous to the claims here were similarly dismissed.

2. The fact of REA's bankruptcy more than four years after the commencement of this action does not change the result. The action was commenced by REA's

new owners for their own benefit. As such, it was barred at the outset by the principles underlying the *Bangor Punta* decision. To alter the result because of REA's subsequent bankruptcy would allow the law to rest not upon a foundation of reason but rather upon the fortuities of timing and would allow the resurrection of actions already long-past barred. As the District Court reasoned, "[t]he illogic of allowing REA to recover now only serves to underscore the artificiality of an exception to *Bangor Punta* which would permit a corporation to recover only if it became bankrupt during the pendency of the proceeding" (406 F. Supp. at 1395; App. 18a). Moreover, bankrupt or not, REA cannot meet the objection that any harm done by the defendants prior to the sale of REA in 1969 constituted, in actuality, harm to the prior-owner railroad defendants themselves (417 U.S. at 712), so that neither's REA's new owners nor REA's post-1969 creditors are entitled to any recovery. *See* 406 F. Supp. at 1936; App. 18a. The claim, if any, of REA employees and pre-1969 creditors are not involved in this action. *See,* opinion of the Court of Appeals in this case, 554 F.2d 1200, 1201 (D.C. Cir. 1977); App. 7a.

3. The presence of defendants additional to REA's prior owners does not affect or limit the application of the *Bangor Punta* doctrine. In determining REA's standing in accordance with the *Bangor Punta* decision, Travelers and the railroads who owned REA are indistinguishable, as they are alleged to have acted in concert with respect to all of REA's factual theories.

As noted earlier, there are no facts alleged in the complaint which relate to separate conduct undertaken or alleged to have been undertaken by Travelers without the participation of or agreement with, the railroads. This was never seriously disputed by REA in the District Court or otherwise.

Allowing REA to continue its action against Travelers or other non-shareholder defendants would thwart application of the *Bangor Punta* principles, since *Bangor Punta* is addressed to plaintiff's lack of standing, *not* to the nature of the various defendants and other alleged conspirators and *not* to the presumed need either to "punish" the defendants or deter wrongful conduct by others. (*See* 417 U.S. at 718, n. 14).

> "If deterrence were the only objective, then in logic any plaintiff willing to file a complaint would suffice. No injury or violation of a legal duty to the particular plaintiff would have to be alleged. The only prerequisite would be that the plaintiff agree to accept the recovery, lest the supposed wrongdoer be allowed to escape a reckoning." 417 U.S. at 717.

Allowing maintenance of this action would encourage "speculation" in rights of action by purchasers of companies with respect to "wrongs done to others" (417 U.S. at 711). As the District Court stated, "REA has not shown any injury which accrued to anyone but the railroad defendants" (406 F. Supp. at 1396; App. 18a).

REA's new owners cannot now contend that they were misled as to the terms and limitations of REA's existing insurance coverage or did not have access to such material when they purchased REA in August, 1969, for not only had the same group been serving as the interim management of REA under a voting trust arrangement immediately prior to their purchase of REA, but no fraud or misrepresentation is even alleged with respect to the sale of shares in 1969. 417 U.S. at 716. This renders inapposite REA's claim that *Bangor Punta* does not apply because fraud is alleged.

REA attempts in other ways to squirm away from the holding of *Bangor Punta* and its clear applicability to the case at bar. For example, REA's claim that *Bangor Punta* was not an antitrust case is patently incorrect. *See* 417 U.S. at 705, 706, 710. Equally specious is its argument that this Court's recent decision in *Illinois Brick Co.* v. *Illinois,* U.S. , 45 U.S.L.W. 4611 (1977), supports REA. Even accepting the dubious assumption that REA's retired employees are "indirect purchasers" of insurance, no retired employee of REA is asserting a claim against any respondent on REA's theory.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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